Supreme Court of the United States

October Term, 1976

No. 75-6933

NATHANIEL BROWN,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

SUPPLEMENTAL BRIEF FOR RESPONDENT

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The Respondent, State of Ohio, files this Supplemental Brief pursuant to United States Supreme Court Rule 41 (5) and respectfully moves the Court to consider the authorities cited herein. This brief is necessary in order to clarify matters raised by Petitioner Brown's Reply Brief which was received by the Attorney for the State of Ohio on Friday, March 11, 1977 and matters raised in the United States Solicitor General's Brief in the case of *United States v. Jeffers*, Case No. 75-1805, cert. granted October 4, 1976 which was filed after the State of Ohio's Brief.

I

Petitioner Brown contends that his prosecution for the felony of auto stealing is barred by his prior conviction for the allegedly lesser included offense of operating a

motor vehicle without the owner's consent, despite the fact that the record in this court does not contain any showing that the initial charging authority had knowledge of the theft which occurred prior to the conviction for operating. See Petitioner Brown's Reply Brief, Part I.

First, the State of Ohio concurs with Brown's admission that "*indeed . . . the record does not reveal any communication*" between the initial charging authority and those authorities who caused Brown's second trial. The fact that the initial charging authorities' complaint states that the auto which Brown operated without the consent of the owner belonged to a Cuyahoga County resident is not sufficient to put the Lake County authorities on notice that a prior theft occurred in Cuyahoga County or anywhere else. Merely because an auto is found in one county, in the custody of someone who is not the owner, is not sufficient grounds for the initial charging authorities to conclude that it was stolen from the true owner in his county of residence. The Lake County authorities probably discovered the true owner from tracing the license plate in the state motor vehicle division, not by talking to her. On the record, in the condition it was presented to this Court by the petitioner's attorney, the Lake County authorities had every reason to believe that either the car was not initially stolen, or if it was stolen, that the theft was perpetrated anywhere, inside or outside of the state, by a third party who placed the car in Brown's custody for him to operate without the true owner's consent.

The State of Ohio concurs with Petitioner Brown in his statement in footnote 2 of his Reply Brief, that the matters contained in that footnote are "*Not of Record,*" and were never presented to any court during the prior proceedings in this case. Such material cannot be considered by the Court at this late date. See *Ciucci v. Illinois*, 356

U.S. 571, 573 (1958); *Stone v. Powell*, Case No. 74-1055, decided July 6, 1976, Slip Opinion 12-14, footnote 15.

Petitioner Brown, in his prior brief, and the Solicitor General's Brief at p. 48 in the *Jeffer's* case, *supra*, both suggest that this Court implicitly assumed in *Waller v. Florida*, 397 U.S. 387, 390 (1970) that prosecution and conviction for a lesser included offense, bars subsequent prosecution for a greater offense because the lesser offense is deemed the same offense for double jeopardy purposes. This Court made no such assumption in *Waller*. Examination of that opinion shows that the *Waller* Court viewed the first state prosecution in that case to be an "included" offense of the charge which resulted in the second prosecution and therefore both offenses were assumed to be "identical" and arise from the same acts. However, the words "lesser included offense" nowhere appear in the *Waller* decision. The *Waller* Court's assumption does not speak to the Double Jeopardy implications arising from a "lesser" included offense.

Furthermore, Petitioner Brown argues, in his main brief at page 11, "no case has been found to allow convictions for both the lesser and the greater offenses." However, in *Diaz v. United States*, 223 U.S. 442 (1912) a defendant was first prosecuted and convicted for assault and battery, and subsequently prosecuted for the homicide arising from one single act of beating his victim. The defendant incurred *first* a criminal punishment for the lesser included offense of the assault and battery, and then, an additional punishment for the homicide which was proved at his second trial, despite the fact that both charges arose from the single act of one beating.

The result in *Diaz* is consistent with the rule that different crimes are not the "same offense" under the Double Jeopardy Clause unless the defendant could have been convicted of the offense charged at the second trial on the

evidence needed to establish the bare elements of the charge tried in the first trial. See *State v. Brownrigg*, 87 Me. 500, 33 A. 11 (1895); 7 BROOKLYN LAW REV. 78, 83 (1937) or unless both charges are *symmetrically identical in law and fact*, see *Burton v. United States*, 202 U.S. 344, 380 (1906) (i.e. both crimes have same number of elements, with both crimes having elements whose descriptions perfectly match the other).

At the very least, Ohio agrees with the Solicitor General's Statement in his brief at page 44 in *Jeffers, supra*, that *Diaz* supports the rule allowing prosecution for the greater offense whenever, for legitimate reasons, like the authorities' lack of knowledge in Brown's case, the government could not have charged the greater offense at the trial of the lesser. For a case where such lack of knowledge was sufficient to permit the second prosecution, see *Williams and Wilson* (1965), N.I. 52 at p. 61, FRIEDLAND, DOUBLE JEOPARDY 192 (1969), quoted in the Solicitor General's Brief in *Jeffers* at page 45.

II

Petitioner Brown argues in his reply brief that the misdemeanor offense of operating constitutes a lesser included offense of the felony offense of stealing an auto. Brown's theory is that the misdemeanor offense (O.R.C. Sec. 4549.04(D)) is written in the disjunctive because Ohio courts have interpreted similarly worded provisions to be disjunctive, citing *Ohio v. Hopkins*, 26 Ohio St. 2d 119, 121-122 (1971). Thus, Brown erroneously concludes that the word "taking" in the misdemeanor statute (Sec. 4549.04(D)) means the same as the word "steal" in the felony statute (Sec. 4549.04(A)).

In *Hopkins supra*, at 120, the Ohio Supreme Court construed an Ohio statute which stated:

> "no person shall buy, receive, or conceal anything . . . which has been stolen . . ."

The *Hopkins* Court read this provision conjunctively, to create one offense of receiving stolen property. Thus, the Court wrote at 121-22:

> "A statute often makes punishable the doing of one thing, or another, or another, sometimes thus specifying a considerable number of things. Then, by proper and ordinary construction, a person who in one transaction does all, violates the statute but once and incurs only one penalty . . .
>
> This rule is sound because it permits the sensible construction that . . . a single course of criminal conduct —dealing in stolen property (is proscribed)."

The *Hopkins* Court then goes on to discuss a disjunctive statute, where several acts which are linked together by the word "or" are deemed to constitute separate crimes because the word "either" proceeds the series linked together by the word "or." See *Hopkins* at 122-123. Under the *Hopkins* analysis, an Ohio statute containing a series of words, limited by the word "or," without the modifier "either" is to be read so that each word in the series is deemed to modify the others, and therefore, such a statute creates *only one crime*. The misdemeanor statute in Brown's case, joy-riding (Sec. 4945.04(D)) conjunctively creates only *one* offense, i.e., operating a car without the owner's consent, because the word "either" does not appear in Sec. 4549.04(D) and cannot modify the series of items linked by the word "or." Since the absence of the word "either" from the joyriding statute signals the reader that the words in the series are intended to modify each other, it is clear that the word "taking" in the misdemeanor statute (Sec. 4945.04(D)) means "taking" in the sense of *operating* without the owner's consent, and cannot mean "taking in the sense of stealing," i.e., intending to perma-

nently deprive the owner of possession as contemplated by the felony offense (Sec. 4945.04(A)). See LEFAVE AND SCOTT, CRIMINAL LAW HORNBOOK SERIES) (West Pub. 1972) pages 131, 637, 694 footnote 15; Anno. 135 Am. St. R. 474, 497 (1911). Such an approach is consistent with the comments in the Legislative History to the misdemeanor joyriding statute which replaced on January 1, 1974, the joyriding provision under which Brown was convicted. In commenting on the traditional purpose of the joyriding statute, the Legislative Service Commission wrote:

> "This section defines . . . the offense commonly known as 'joyriding.' For some years auto theft has been an increasing problem, and in this type of offense, it is difficult to prove that the offender *intended to permanently deprive* the owner of the car. The offense of joyriding was designed to alleviate the enforcement problems this creates and *the gist of the offense is simply an unauthorized use of the vehicle. It is unnecessary to prove intent to permanently deprive the owner.*"
>
> (Emphasis added.)

See, OHIO CRIMINAL LAW AND PRACTICE, written by Schroeder and Katz, Vol. I, Banks Baldwin Law Publishing Company, Copyright 1974, quoting the Legislative Service Commission note dealing with Ohio Revised Code Section 2913.03 (eff. January 1, 1974). See also, Editor's *Comments.*

This Court should also note that in *State v. Ikner,* 44 Ohio St. 2d 132 (1975) decided several days after the Court of Appeals decision in Brown, the Ohio Supreme Court held that a city misdemeanor joyriding ordinance, worded almost identically to the misdemeanor statute under which Brown was convicted (4549.04(D)), was *not* a lesser included offense of the felony of concealing a stolen auto (O.R.C. 4549.04(E)), which felony like the

felony for which Brown was convicted (Sec. 4549.04(A)) is a larceny offense, requiring an intent to permanently deprive the owner of possession.

Therefore, the State of Ohio continues to urge that the misdemeanor joyriding statute is not a lesser included offense of the felony of auto stealing, either under Ohio law or under traditional double jeopardy analysis. However, even if this court should hold that the joyriding misdemeanor is a lesser included offense of the felony, the felony prosecution is permissible to furnish the State of Ohio with an opportunity to *certify Brown's factual guilt.* In such a case, the defendants true double jeopardy interest lies in protection from disproportionate punishment under the Eighth Amendment standards, or purposefully, wholely, arbitrary harassment under the Due Process Clause. See *Diaz* and Part II of Ohio's Main Brief. However, Brown has not suffered severe punishment at all. Had he been prosecuted only once, for the felony, he could have lawfully received a 20 year sentence. Instead, he was prosecuted twice and after serving only a handful of days in jail, complains that he has been treated unconstitutionally. Certainly, the fundamental law of the land was not designed to create such anomolies in favor of a defendant, who has knowingly and voluntarily admitted his guilt to all charges in open court.

Respectfully submitted,

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